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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1597

FEDERAL POWER COMMISSION,
Petitioner,

vs.

GREENE COUNTY PLANNING BOARD, TOWN OF DURHAM, NEW YORK, ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK and THE SIERRA CLUB,
Respondents.

BRIEF OF RESPONDENT POWER AUTHORITY OF THE STATE OF NEW YORK IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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August 8, 1972

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This case involves a strictly procedural dispute between the Federal Power Commission (Commission) and some intervenors in a Commission proceeding who oppose constructon of a transmission line. Respondent, Power Authority of the State of New York (Authority) and consumers in New York State are unfortunately caught in the cross fire.

The Authority opposes the granting of the petition for a writ of certiorari on the grounds that:

1. A resolution of the issue which the petition asks this Court to resolve under "QUESTION PRESENTED" was not included in the judgment of the court below. By way of dictum the court expressed the opinion that prior to the start of hearings, which were in progress at the time of the court decision, on a transmission line with respect to which there is a contest, the Commission should have

circulated a draft environmental statement prepared by its staff with respect to the line.* However the court allowed the proceeding for approval of the line to continue, directing that a draft environmental statement be prepared and circulated and that intervenors be given an opportunity to cross-examine with respect to it prior to the Examiner's initial decision. Thus the dictum which is the subject of the "QUESTION PRESENTED" does not reflect the holding which was the foundation of the judgment. (Pet. App. pp. 10a, 18a.)**

2. The case should be considered moot because the Commission largely complied with the judgment of the court below before countermanding an order it had given its staff to comply. (The recission order was made after the Solicitor General agreed to petition for a writ of certiorari.)

3. This case is not a proper vehicle for this Court's resolution of the several complicated questions which are currently being considered throughout the United States with respect to interpretation of the National Environmental Policy Act (NEPA) (42 U. S. C. § 4321 *et seq.*) since: (a) this case at most involves only one of such questions and a narrow one at that; (b) other pending cases involve additional questions as well; (c) the Commission's compliance with the order of the court below would require virtually no additional functions to be performed by its staff except circulation of a draft statement which has already been prepared or virtually prepared and thus

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* The Court also expressed the opinion that a draft environmental statement should have been prepared and circulated by the Commission prior to its making a determination with respect to two transmission lines concerning which there was no contest and no hearing. It denied the relief sought with respect to those lines.

** References to the Solicitor General's Appendix are to "Pet. App." References to the Authority's Appendix annexed hereto are to "A. App."

would impose no burden on the Commission; (d) granting the petition would inevitably result in extremely serious delay in the availability of transmission facilities urgently needed to carry electric power, particularly to the New York City area, and hence would be very much against the public interest whereas review will undoubtedly be sought in other cases where similar consequences would not result; and (e) the merits of the case before the Commission are not involved.

Events in the Proceeding

On August 15, 1968 the Authority applied to the Commission for a license to build a one million kilowatt pumped storage hydroelectric project in the Catskill Mountains southwest of Albany. (The project is known as the Blenheim-Gilboa Project.)

On June 6, 1969 the Commission issued a license for the plant and *three transmission lines* connected with the project switchyard but required that construction of the lines be deferred until the Commission specifically approved plans for design and location including "plans for preservation and enhancement of the environment as it may be affected by the transmission lines[']] design and location".

On June 16, 1969 the Authority accepted the license, immediately started construction and proceeded to borrow in stages approximately $200,000,000 to pay the cost.

On November 24, 1969 the Authority filed for approval plans for the three transmission lines together with an Appendix describing environmental considerations.

On January 1, 1970 the President signed NEPA and it became effective on that date. (It had been passed by both Houses of Congress in December, 1969.)

On April 10, 1970 the Commission after study by its staff approved plans for two of the lines, there being no opposition to them.

There being opposition to the third line, largely by residents of Durham, one of the towns in Greene County through which it would pass on its way to Leeds near the Hudson River south of Albany, the Commission deferred action with respect to it and granted petitions for intervention by respondents herein (other than the Authority) and several landowners in the Durham area.

On December 4, 1970 the Authority filed an amended application for approval of the Leeds line containing a modification of the route first proposed and also an alternate route avoiding most of Durham but traversing a good part of the Town of Greenville in Greene County.

Also on December 4, 1970 the Commission issued its Order No. 415 for the first time establishing regulations implementing NEPA. (36 F. R. 18958, 18 C. F. R. §§ 2.80-2.82.)

On March 15, 1971 the Town of Greenville which objected to removal of the proposed line location from Durham into its territory filed objections to the alternate route and moved to intervene. (Intervention was granted on May 4, 1971.)

On March 26, 1971 the Authority filed its Environmental Statement with respect to the Leeds line in compliance with the Commission's Order No. 415. The Authority circulated the Statement as required by Commission regulations and gave it additional circulation and publicity beyond that required by the regulations. In the Environmental Statement the Authority described three additional alternate routes for the line which were advanced by people objecting to the two alternates set forth in the Authority's amended application for approval. The Statement made clear that the Authority did not consider any of the three added alternates feasible.

The Commission staff reviewed the Authority's Environmental Statement as to form, found it not to be deficient, circulated it among federal and state agencies,

sought their advice with respect to it and made it public as required by Commission regulations. (The court below held the consultation requirements of NEPA were thereby met. Pet. App. pp. 17a-18a.)

On June 22, 1971, following a Commission order directing that hearings be held, a Commission Examiner conducted a pre-hearing conference and set up a procedural schedule for filing and serving prepared written testimony by the Authority, the staff and the intervenors and for the actual holding of hearings.

In November and December, 1971 and January, 1972 hearings were held but not completed.

In the meantime on October 22, 1971 some of the intervenors petitioned the United States Court of Appeals for the Second Circuit for review of the Commission's assumed denial by silence of many motions made by the intervenors including motions to stop construction of the project proper and the two transmission lines, construction of all of which was then about 80% complete, and a motion to stay the proceeding on the Leeds line pending the Commission's distributing a draft environmental statement which intervenors contended should have been done before the hearings started.* The court denied a motion to stay the proceeding and on January 17, 1972 entered the

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* On November 19, 1971 while the court proceeding was pending the Commission issued its Order No. 415-B amending Regulation §2.81(b) to provide that the applicant's draft statement after being approved as to form by the staff and after being modified if found to be deficient in form "shall be deemed to be information comparable to an agency draft statement pursuant to Section 7 of the Guidelines of the Council on Environmental Quality". (Pet. App. pp. 33a, 44a.)

Before argument in the court below Authority Counsel pointed out to Commission Counsel the urgent need for the Leeds line and the importance of keeping the proceeding before the Examiner going. Authority Counsel requested that the Commission file and distribute a draft environmental statement and thus avoid a court decision.

(Footnote continued on next page)

judgment here sought to be reviewed. The only relief granted by the judgment was a direction to the Commission to have its staff, prior to the Examiner's initial decision, prepare and circulate a draft environmental statement and obtain comments on it and that the Examiner allow the intervenors to examine Authority and staff witnesses with respect to it before the hearings are closed. (Pet. App. p. 18a.) (The court expressed the opinion that NEPA requires that a draft statement be circulated before hearings in all cases except where there are two hearing the first "*solely* to gather information to aid the Commission in formulating its statements, the

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(Footnote continued from preceding page)

After the Court of Appeals' decision Commission Counsel made it clear to Authority Counsel that in cases other than the instant case the Commission would go ahead with administrative proceedings upon applications under the Federal Power Act and the Natural Gas Act where significant environmental considerations are involved without complying with what the opinion of the court below said the law to be. The fact that it is doing so is illustrated by a gas certificate case involving a $139 million gasification plant and related pipeline facilities for which application to the Commission was filed in October 1971 and in which hearings were ordered by the Commission on February 24, 1972 five weeks after the Court of Appeals' decision in the instant case without requiring staff to file a draft environmental statement. The hearing was completed May 24, 1972. The staff did not file a draft statement before, during or after the hearing. *Tecon Gasification Co. et al.*, FPC Docket Nos. CP72-100, *et al.* (See also *Utah Power and Light Co.*, Project No. 1744; *Arkansas Louisiana Gas Co.*, Docket No. CP70-267, Opinion No. 612, issued February 18, 1972; *Distrigas Corporation*, Docket Nos. CP70-196, *et al.*, Opinion No. 613, issued March 9, 1972; *El Paso Natural Gas Company*, Docket No. RP72-6, Order issued March 6, 1972; *United Gas Pipeline Co.*, Docket Nos. RP71-29, *et al.*, Opinion No. 606, issued December 3, 1971, Presiding Examiner's Order issued February 17, 1972, and Order issued March 31, 1972, staying Presiding Examiner's ruling; and *Florida Gas Transmission Company*, Docket No. CP70-104, Order issued February 17, 1972.) See, however *Columbia LNG Corporation, et al. (infra pp. 17-19)* where the Commission staff circulated its own draft statement in a brief to the Examiner at the close of hearings and asked for reopening of hearings to consider matters reflected in it.

second to consider the merits of the license application" (Pet. App. p. 16a, emphasis added). This statement of the court was not necessary to the judgment.)

The court again refused to stop the proceeding before the Examiner pending circulation of, and receiving comments on, a draft environmental statement and left it to the Commission to determine the most efficient procedure for meeting the court's mandate. (Pet. App. p. 18a.)

Basically what the court did in its judgment was to hold that before the close of hearings on an application to a federal agency for a license or other approval in a situation significantly affecting the environment, the agency through its staff must prepare, circulate and receive comments on an agency draft environmental statement and the Examiner must give intervenors an opportunity to utilize that statement in the course of hearings. In doing so the court held invalid the provision in Section 2.81(b) of the Commission's regulations that an applicant's draft environmental statement as modified by applicant if required by initial review by the staff as to form is "information comparable to an agency draft statement". The court held that an agency's circulation of an applicant's statement after any required modification as to form does not satisfy the requirement that the agency's staff circulate and receive comments on a draft statement of its own composition. (Pet. App. pp. 9a-18a.)

On January 28, 1972, the Commission Examiner held a formal conference to discuss the judgment of the court and to establish procedures for going ahead. Intervenors refused to attend but sent the Examiner a letter stating their position. At the conference Commission Staff Counsel stated that the staff would prepare and file a draft environmental statement and asked a specific time in which to do so. Staff Counsel also asked that the Authority furnish the staff with a great deal of information which they listed on the record including prognoses as to the need for

power in New York State in the 1970's and 1980's and plans of the Authority and other power entities for providing generating and transmission facilities to supply such needs. Covered by the request was the report of the results of a feasibility study of proposed additional generation facilities on the Schoharie Creek which the Authority had announced was being made at the prehearing conference the preceding June and which it then had agreed to make available to all parties and the public during the hearings as soon as completed. (The report was nearly complete at the time of the January 28 request and was filed shortly thereafter.) In addition Staff Counsel asked that the intervenors be required to file prepared testimony which they had been directed to file and had agreed to file by January 18, and had prepared but had not filed. Staff Counsel stated that all this material was needed for the preparation of the draft statement.

The Examiner made an order setting a time for circulation of a draft statement and refused to delay the resumption of hearings as requested by intervenors in their letter until the draft statement had been circulated for 45 days.* The Examiner stated however that intervenors could move to fix time and place of hearings to conform with their convenience.

After the Examiner at the intervenors' request certified procedural questions to the Commission, the Commission on March 7, 1972 issued an order affirming the Examiner's direction that the staff file and circulate a draft environmental statement by the time prescribed but modified his procedural schedule by providing that hearings resume after the statement had been distributed for 45 days and comments received from interested agencies rather than while it was being prepared and distributed. (A. App. pp. 1a, 15a.)

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* Section 2.81(b) of the Commission's regulations provides that agencies to which an environmental statement is circulated shall be afforded 45 days in which to respond.

In its March 7 order the Commission directed:

> "(C) The Examiner shall reopen the record to receive, as soon as practicable after the completion of such circulation period, additional direct testimony from PASNY and the Commission staff, and to allow additional cross-examination promptly thereafter; and he shall open the record to receive, as soon as practicable after the completion of such cross-examination, direct testimony from Intervenors, and to allow cross-examination promptly thereafter." (A. App. p. 5a.)*

In its March 7 order the Commission said that it was seeking a rehearing of the Court of Appeals' judgment but that

> "* * * the public interest requires that this proceeding progress rather than remain dormant pending judicial review * * *." (A. App. p. 4a.)

The Court of Appeals denied the Commission's petition for rehearing on March 10, 1972. (Pet. App. pp. 31a-32a.) The Commission asked the court to stay its mandate but the court refused on April 5, 1972.

On February 28, 1972 the Court of Appeals granted a motion by the Authority to clarify its opinion by correcting minor errors and by amending a statement in the opinion about the Authority which had been taken from the brief of petitioner Greene County Planning Board. (The corrections and amendment are not reflected in the opinion as printed in Appendix A to the petition for a writ of certiorari. The court's order is printed in the annexed appendix at p. 18a.)

The intervenors filed and served some written testimony, they had already prepared, as directed by the Examiner and the Authority filed and served a great mass of material requested by the Commission's staff. The last day upon which the staff could possibly have filed a draft environmental

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* The record was never closed.

statement in timely compliance with the March 7, 1972 order of the Commission was May 15, 1972.*

On June 1, 1972 the Commission unilaterally and without notice to any of the parties other than its staff issued an order countermanding its March 7 direction to the staff to prepare and circulate an environmental statement. The order also stayed the administrative proceeding before the Examiner. The stated reason for the order was that the Solicitor General had agreed to apply for a writ of certiorari and there was concern that if the staff were not forbidden to circulate the draft statement the case might become moot and further concern that continuance of the proceeding absent obedience to the Court of Appeals' judgment directing circulation of the draft statement might conflict with that court's mandate. (A. App. pp. 6a-8a.)

In efforts to persuade the Commission to rescind or modify its June 1 order so that the proceedings could continue the Authority took many steps including: a telegraphed request by the then Acting Chairman of the Authority for rescission which the Commission treated as a motion for reconsideration; a motion to the Court of Appeals for clarification of its judgment to make clear whether or not it would consider continuance of the proceedings absent the Commission's compliance with the court's direction with respect to the draft environmental statement a violation of the mandate; an application to this Court which was referred first to Mr. Justice Marshall and later to Mr. Justice Rehnquist for a full or partial stay of the Court of Appeals' judgment to the end that proceedings continue pending decision on the petition for a writ of certiorari; and a formal application for rehearing by the Commission of its June 1 order.

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* The draft statement was required to be filed within 45 days after receipt by the Commission staff of material requested *on the record* at the January 28 conference from Authority and intervenors. The staff requested further material *informally* from the Authority, the last of which the Authority submitted on March 29, 1972, 45 days before May 15.

The telegraphed request which was treated by the Commission as a motion for reconsideration was denied July 5, 1972. (A. App. p. 9a.) The motion to the Court of Appeals for clarification was denied June 14, 1972. The application to this Court for a full or partial stay was denied by Mr. Justice Rehnquist on July 27, 1972. The application to the Commission for rehearing was denied on August 1, 1972. (A. App. p. 12a.)

Jurisdiction of the Commission

Section 4(e) of the Federal Power Act (16 U. S. C. §797(e)) authorizes the Commission to issue licenses for project works "necessary or convenient" for power developments on waterways over which Congress has jurisdiction. Section 3(11) in defining "project" includes "primary line or lines transmitting power therefrom [the project] to the point of junction with the distribution system or with the interconnected primary transmission system". (16 U.S.C. § 796(11)). The Leeds line does not connect with a distribution system. Neither does either of the other two lines included in the project. The other two lines are already part of the State's interconnected primary transmission system. If the Leeds line is completed it will be also. It will be a very important part of it.

The Commission licensed the three lines as primary lines but in the Leeds proceeding the matter with respect to that line has been reopened.

Some intervenors took the position that the Leeds line if constructed will not be a primary line but will be part of the interconnected grid. At the initial hearing in Albany the Examiner refused to require the intervenors unequivocally to state on the record at that time whether or not such was their position.* In contesting the need for

* The discussion before the Examiner appears at pp. 178-181 of the transcript of the hearing in the proceeding held on November 9, 1971 at Albany, N. Y.

the line at the hearings intervenors restricted their cross-examination to the need for the line to carry project power and to insure stability of the power plant. Thus they confined their treatment of need to need as a primary line.

If the line were held not to be a primary line the Commission would not have jurisdiction and the line could legally be built by the Authority under state law (New York Public Authorities Law, § 1005). Thus, whether or not it is a primary line is a threshold issue in the Commission proceeding. A resolution of the issue has been put off by the Commission's June 1, 1972 order staying the proceeding "pending final review by the United States Supreme Court of the Court of Appeals decision * * *." (A. App. p. 8a.)

Status of Commission Proceeding

Many issues have been raised in the Leeds line proceeding, some by the intervenors' cross-examination of witnesses presented by the Authority and the Commission staff, some in direct testimony of Commission staff witnesses, some in New York State Public Service Commission comments on the Authority's Environmental Statement and some as a result of events which have occurred since the amended application for approval of the line was filed in December, 1970. Included among the latter are changes in route which the Authority has suggested and which resulted from recent developments in the area involved such as subdividing and the building of structures.

While the original application sought approval of a single circuit 345 kv line, the Commission because of the prospect of additional generating facilities being constructed in the area and elsewhere must consider whether the towers should be capable of carrying two 345 kv circuits as suggested by the State Public Service Commission and whether they should be capable of being converted to 765 kv as suggested by a Federal Power Commission

expert witness. Both suggestions were made in anticipation of further transmission capacity being needed in the future because of construction of additional generating facilities by the Authority and other power entities. Testimony showed that additional facilities will be necessary as part of the interconnected grid whether more generating facilities are constructed on the Schoharie or not.

The Commission must consider the additional issues, not only because of NEPA but also because of the requirements of Section 10(a) of the Federal Power Act which provides:

> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interestate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes * * *." (16 U. S. C. § 803(a); see *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F. 2d 608 (2d Cir. 1965), *cert. denied sub nom., Consolidated Edison Co. of New York* v. *Scenic Hudson Preservation Conference*, 384 U. S. 941 (1966); *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 453 F. 2d 463 (2d Cir. 1971), *cert. denied*, 32 L. Ed. 2d 813 (1972).)

Long before the hearings commenced, the locations of the alternate routes of the line for which approval had been sought as well as information with respect to voltage and design of structures shown in the application for approval were advertised in newspapers and given wide circulation. Notice was given as to where and when the application, plans and drawings including sketches of alternate types of structures could be examined.

Some of the additional issues, further consideration of which must be given in the proceedings, are so substantial

that additional advertising and other forms of notice must be carried out in order to comply with the Federal Power Act, the Commission's regulations thereunder and related statutes.

A great amount of prepared testimony and exhibts must be submitted by the Authority and by others who wish to do so.

For example, intervenors cross-examined Authority and staff witnesses at length on the issue of undergrounding but have submitted no affirmative testimony on the issue and no exhibits. Likewise they cross-examined at length on the need for the line as a primary line and did some cross-examination on route selection but have submitted no testimony of their own on either and no exhibits except an essay on the history of the Susquehanna Turnpike concerning which some of the prepared testimony they submitted relates.

The Authority, as required by the Commission, submitted exhibits showing precise locations and elevations of tower sites on the two alternate line routes one or the other of which the Commission has been asked to approve. It must submit similar exhibits with respect to suggested revised route locations not only for single circuit 345 kv towers but for higher towers capable of carrying two 345 kv circuits and for still higher towers capable of carrying two 345 kv circuits and being converted to a single 765 kv circuit. It also must present exhibits showing locations of the higher towers on the routes already subject to the hearings. The Authority will of course also have to submit direct testimony explaining the exhibits. Higher towers require a wider right-of-way and the effect of widening must be shown.

The Authority intends to produce additional evidence on the need of the Leeds line to carry power to the New York City area and on the need of the line to insure stability of the power plant and of power systems to which the power will be delivered when one of the other lines from the plant

is out of service because of faults or maintenance requirements.

The Authority will be prepared to supply the additional material soon after an order is given for the proceeding to be resumed. However, everything has been stayed by the Commission's June 1 order. (A. App. p. 6a.)

Status of Project Construction

The project proper consisting of a lower reservoir in Schoharie Creek with a dam designed to handle 155,000 cubic feet of water per second, an upper reservior 1,000 feet higher, a powerhouse, penstocks, motor generators, pump turbines, dikes, roads, and other features is 92% complete. The transmission lines to Fraser (Delhi) and to New Scotland (Albany) are complete. They were energized on July 27, 1972 and are being used to bring power from the west, largely Pennsylvania, to the Albany area.

Other Pending Cases Involving Interpretation of NEPA

On May 22, 1972 this Court granted a writ of certiorari to the Court of Appeals for the Tenth Circuit in *Upper Pecos Association* v. *Stans*, 452 F. 2d 1233 (1971), 40 L. W. 3556. The case involves a two to one decision affirming a judgment of the District Court for the District of New Mexico on a challenge to the legality of a grant made by the Economic Development Administration of the Department of Commerce (EDA) to a county in New Mexico of 80% of the cost of building a road in the Elk Mountain area. A declaratory judgment was sought to the effect that the grant was invalid because of violation of NEPA (328 F. Supp. 332). EDA issued no environmental statement before or after making a decision to make the grant of money but the Forest Service which was charged with approving the location of the road and which the court found to be the "lead agency" did circulate an environmental impact statement after the decision on the grant had

been made by EDA. The opinion of the majority of the Court of Appeals said that there was presented a question of the point in time at which an environmental statement must be available. The majority of the court held that the circulation of the environmental statement after the EDA decision on the grant was timely. The dissenting judge took the position that NEPA required that EDA consider the environmental consequences of making the grant and that it had failed to comply with NEPA. (452 F. 2d at 1234-37.)

In the instant case this Court is asked for an advisory opinion. The subject of the requested opinion is actually in issue in the *Upper Pecos* case. This Court can, therefore, answer the "QUESTION PRESENTED" in the instant case in the *Upper Pecos* case which is already before the Court. It can do so without the unfortunate delay to an important public project which will come about if a writ is granted in the instant case.

Kalur v. *Resor*, 335 F. Supp. 1 (D. D. C. 1971), is an action for a declaratory judgment and injunction. The court set aside regulations promulgated by the Secretary of the Army under NEPA and Section 13 of the Rivers and Harbors Act of 1899 (33 U. S. C. §407). The regulations were concerned with applications for permits to make discharges into navigable streams or non-navigable tributaries. The court held, contrary to the contentions of the Government, that NEPA applies to all applications for permits to discharge material into navigable streams including those where water quality is involved and held invalid Corps' regulations exempting the Corps from issuing environmental statements in permit cases where water quality is solely involved.* The case is on review before the Court of

* It also held that Section 13 of the Rivers and Harbors Act forbids discharges into non-navigable tributaries of navigable streams and that the Corps of Engineers does not have authority to permit such discharges although it does have such power as to navigable streams.

Appeals for the District of Columbia Circuit and is expected to be argued early in the fall. It involves issues in addition to the narrow issue sought to be presented in the instant case and is deemed to be of great importance by the Department of the Army. A writ of certiorari will almost inevitably be requested. The proceeding is a general attack on regulations under which no action was ever taken. No specific project is involved so the question here sought to be resolved along with other NEPA questions could be resolved by this Court in that case without delaying a vital public project.

For other cases involving preparation and circulation of agency environmental impact statements, the scope of review under NEPA and the question of what constitutes major federal actions subject to NEPA see *Sierra Club* v. *Sargent,* Civil No. 249-71C2, (W. D. Wash. March 16, 1972); *Students Challenging Regulatory Agency Procedures* v. *United States,* No. 971-72, (D. D. C. July 10, 1972) involving an Interstate Commerce Commission freight rate decision; *Citizens for Clean Air* v. *Froehlke,* No. 72 Civ. 2259, (S. D. N. Y. August 1, 1972). See also *Sierra Club* v. *Hardin,* 325 F. Supp. 99 (D. Alaska, 1971). That case which involves the need, adequacy and timeliness of an environmental statement is scheduled to be argued in the Court of Appeals for the Ninth Circuit on September 7, 1972.

The Commission staff did largely what the court below directed be done in the instant case, in *Columbia LNG Corporation, et al.* (F.P.C. Docket No. CP71-289 *et al.*) The case involves an application for approval of a liquid natural gas facility on Chesapeake Bay in the area of Calvert Cliffs Park which was described in *Calvert Cliff's Coordinating Committee, Inc.* v. *Atomic Energy Commission,* 449 F. 2d 1109 (D. C. Cir. 1971). Approval was sought for various project features including a pier extending 6,000 feet from the shore of Cove Point to accommodate tremendous tankers. The application was filed on June 4, 1971. Hear-

ings before an Examiner were completed on July 8, 1971. The Commission staff filed a brief with the Examiner on August 16, 1971. Attached was an appendix labeled "Draft Environmental Statement". The statement was circulated for 45 days. On August 18, 1971 the staff made a motion requesting that state and federal agencies be allowed until September 30, 1971 to file comments in connection with the staff draft environmental statement.

Thereafter and before the Examiner handed down a decision the Commission staff joined in a successful application to reopen the hearings and urged that witnesses on environment previously examined be subject to cross-examination. Additional hearings were held and environmental testimony received. The hearings were concluded on January 24, 1972, seven days after the decision of the court below in the instant case. On February 29, 1972, the staff filed a brief attached to which was an appendix modifying and updating its draft environmental statement based upon evidence at the second hearing . This was one month and 12 days after the decision of the Court of Appeals in the instant case. On May 15, 1972 the Commission issued an order expediting proceedings and cutting down on the time prescribed in the regulations for the parties to file exceptions to the Examiner's decision. His decision was filed on May 22 and included a draft "Environmental Statement". On June 28, 1972, thirty-seven days after the Examiner's decision the Commission adopted his decision with some modifications. The Commission decision contained a final environmental statement.

The action of the Commission Staff in the *Columbia* case did not conform to the judgment of the court below in that its draft statement was not filed prior to the close of the hearings before the Examiner. However, it cured the lack of conformance by circulating the statement and joining in the successful application to the Examiner to reopen the hearings in which environmental evidence was received.

On motion of parties including the Sierra Club and the Maryland Conservation Council, the Commission issued an order granting rehearing. The grounds upon which rehearing was sought included allegations of violation of the Commission's own environmental regulations with respect to notice and violation of NEPA including alleged violations of requirements with respect to the draft environmental statement.

Court review will undoubtedly be sought in the case which involves many issues and a writ of certiorari will almost certainly be asked.

Many other cases involving NEPA are pending throughout the country.

The Urgent Need for the Line

The line as planned is only about 33 miles long and if built without further extensive delay will replace only four or five houses. It is of vital importance to carry power to the New York City area and to insure the stability of the project power plant and of at least one power system to which power will be directly delivered. It is needed both as a project primary line and as a necessary link in the interconnected grid. It is by far the most important of the three project lines. Although need for the line is one of the issues raised by intervenors all evidence presented has shown the need and none has shown a lack of need. More evidence based on additional recently completed computer tests will be presented when the hearing resumes.

Leeds is on the way to New York City from the Blenheim-Gilboa Project. To increase substantially the amount of power which can be carried from the project and the west to New York the Leeds line must be completed and the capacity of some connections between Leeds and New York increased. This increase in capacity is being delayed pending decision on whether or not the Leeds line in fact

will be built because the power entities involved need to have assurance that it will be built before commiting the necessary funds.

When the Leeds line is built and the capacity of those connections increased and a 345 kv interconnection from Fraser south (the missing links in which have recently been approved by the State Public Service Commission) is built the amount of power which can be carried from upstate New York to New York City will be increased by an amount almost equal to the amount which can be carried to New York now over existing facilities.* The Leeds line is essential to this result.

While the City's peak loads are in the summer, upstate's peak loads are in the winter. Thus, the Blenheim-Gilboa plant will be of the most value upstate in the winter and in the City in the summer.

The power situation in New York City and Westchester County in the summer is desperate and getting worse. The 1,000,000 kilowatt Blenheim-Gilboa plant represents almost one-eighth of the peak power load which New York City experiences in the hot summer months. The Leeds line is essential for carrying power to the New York City area.**

Because of delay already experienced it is not now possible to have the Leeds line and the improved interconnections on the east side of the Hudson ready for service to

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* There are two 345 kv lines between Albany and Leeds. When the Authority's Leeds line is complete it together with its New Scotland line will constitute a third 345 kv line to Leeds.

** Leeds is a key point. A very important new switchyard is located there. Two 345 kv lines and some lower voltage lines from it go across the Hudson and down the east side to New York City. Additional 345 kv lines will be substituted for the lower voltage lines. It is this work which is being impeded by delay in the Leeds line. Recently a 345 kv line was completed from Leeds on the west side of the river south to Roseton about half way to New York City. A 345 kv interconnection is planned from Roseton south for future construction.

New York for the summer of 1973. It is important that further delay be avoided in order to have them ready for the summer of 1974.

The Authority's Position With Respect to the Opinion Below

The Authority sympathizes with the problems of the Commission and other agencies in carrying out traditional duties and in addition the many added duties imposed by NEPA. The Authority is in the position of other public and private organizations which have an obligation to supply goods or services vitally needed by the public. It believes that there must be an accommodation between environmental considerations which are of course extremely important and the needs of human beings for the essentials of life such as electricity. It recognizes that ultimately this Court must resolve differences between extreme positions taken by some as to interpretation of statutes designed to safeguard the environment and the positions of entities charged with the responsibility to construct needed facilities which have an effect on the environment.

We believe that the opinion of the court below to the effect that agency draft environmental statements must be submitted prior to the start of administrative hearings in all cases except where an administrative hearing is conducted "*solely*" for the purpose of obtaining information on which to base the statement is unsound. There is no statutory or practical basis for it. An agency staff can formulate a much more useful and adequate statement after a hearing is commenced and issues joined than before.

However we believe that the actual judgment of the court below requiring a staff draft statement prior to the close of the hearing is reasonable and legally justifiable. It is consistent with the position the Authority took in the court below. (Pet. App. p. 10a.)

Conclusion

It was not necessary for the court below to answer the "QUESTION PRESENTED" in order to reach its judgment. The opinion expressed by the court that an agency draft environmental statement must be circulated prior to commencement of administrative hearings is dictum. The judgment of the court was that such an impact statement must be circulated *before hearings are closed* and must be made a subject of the hearings if requested by intervenors. Hence, there is not presented to this Court a controverted issue necessarily passed upon and since the judgment does not match the "QUESTION PRESENTED" it is not properly reviewable.

The Commission substantially complied with the mandate of the court below by having its staff either complete or almost complete a draft environmental statement after receiving from the Authority a mass of technical information and computations which it prepared at great expense and in good faith on the basis of the staff's formal statement in the course of Commission proceedings that it was necessary for the preparation of a draft statement which the staff stated it would circulate and which the Commission later formally ordered it to prepare and circulate. Under these circumstances the Commission's abrupt change of course did not keep the case from being moot.

Other cases now in litigation, one of which is already before this Court and several of which will almost surely be brought to the door of this Court, involve the question here sought to be resolved as well as other questions with respect to interpretation of NEPA. The case in which a writ of certiorari has already been granted or one of the others now in litigation would form a much better vehicle for this Court's interpretation of NEPA than the instant case.

Requiring the Commission to comply with the judgment of the court below by denying the petition would require no substantial work on the part of its staff or place any

burden on the Commission because of the extent to which the judgment has already been obeyed. On the other hand the Authority would be put to great hardship and expense by the granting of the petition and power consumers would be put at a great disadvantage because of the delay in the construction of essential power facilities.

For these reasons the petition for a writ of certiorari should be denied.

However, it is respectfully requested that in the event the petition is granted the Court direct that the proceedings before the Commission be resumed and carried forward during pendency of the case in this Court. This would be highly proper because (i) the court below held that the Commission had carried on adequate consultation with other agencies by circulation of the Authority's Environmental Statement, (ii) all issues which could conceivably be raised in the proceeding before the Commission have already been raised so the availability of a staff environmental statement is not essential for notice purposes, (iii) the merits of the case before the Commission are in no way involved, and (iv) regardless of what decision this Court might finally make on the merits a Commission environmental statement could be circulated before the hearings are finally closed and made available as provided in the order of the court below.

Respectfully submitted,

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August 8, 1972.

APPENDIX

FPC Order of March 7, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; John A. Carver, Jr., Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER ADOPTING PROCEDURE FOR HEARING

(Issued March 7, 1972)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). The principal project works and two of the lines are currently nearing completion. This proceeding involves PASNY's application to construct the third line, which it proposes to route from the Town of Gilboa, in Schoharie County, New York, to the Leeds substation in the Town of Athens, in Greene County, New York.

As of the conclusion of the cross-examination of PASNY's and the Commission staff's direct witnesses on January 7, 1972, the schedule for the hearing provided that Intervenors would file the prepared testimony of their direct witnesses on or before January 18, 1972, and that cross-examination of such witnesses would commence on February 15, 1972. On January 17, 1972, however, the United States Court of Appeals for the Second Circuit issued an opinion[1] holding that the Commission staff is required by

[1] *Greene County Planning Board* v. *Federal Power Commission*, Docket Nos. 71-1991 and 71-1996.

the National Environmental Policy Act of 1969 (NEPA) to prepare and circulate a draft environmental impact statement and should have done so prior to the hearing.

Intervenors did not file the prepared testimony of their direct witnesses when due and, by Notice issued January 21, 1972, Presiding Examiner William C. Levy called a conference for January 28, 1972, "for the purpose of considering the impact of the Court of Appeal's [sic.] opinion on the future course of this proceeding and adopting such procedures and schedules as may be required by the courts [sic.] opinion and remand."

The Commission staff indicated at the conference that it would prepare and circulate an environmental impact statement solely for the purpose of expediting the proceeding and not as an interpretation of the Court of Appeals' opinion. The staff requested that the environmental information accumulated by both PASNY and Intervenors be made available for the preparation of such statement, and it asked specifically that PASNY furnish certain data and that Intervenors furnish the prepared testimony which should have been filed on or before January 18, 1972. The Examiner directed that PASNY furnish the requested material as soon as possible and that "the staff will have 45 days from the receipt of that material to file the detailed environmental statement required by the court's mandate."

Intervenors did not appear at the conference. Instead, they expressed their positions in a letter dated January 25, 1972, in which they challenged the Examiner's continuing jurisdiction in the proceeding through the Court of Appeals' statement,

> "We leave to the *Commission* to determine the most efficient procedure for meeting this mandate [Emphasis added]."

They also indicated that the character and scope of their witnesses' testimony would be substantially affected by the Commission staff's environmental impact statement, and

that it would be financially burdensome and wasteful of time to file what they had prepared and submit their witnesses to cross-examination prior to their receipt of such impact statement. Nonetheless, the Examiner ruled that he had continuing jurisdiction and directed "them to file this overdue direct testimony forthwith", granting leave for Intervenors to move that "such witnesses be cross-examined at a time and place convenient".

By letter dated February 4, 1972, Intervenors asked the Examiner to reconsider such rulings and, in any event, to reduce all of his conference rulings to writing and refer them to the Commission pursuant to § 1.28 of the Commission's Rules of Practice and Procedure. As a result, the Examiner issued a Notice dated February 9, 1972, in which he set forth, reconsidered and reaffirmed his conference rulings[2] and certified them to the Commission.

Intervenors state in their request that "we had testimony in a prepared form on January 17, 1972 and obviously it would be a small burden, financially speaking, for us to file this material at this time." They assert, however, that they should not have to file the testimony because to do so would further violate NEPA by continuing the hearing prior to the preparation by the Commission staff of a draft environmental impact statement, and they state that such

> ". . . testimony contains statements of position, recommended compromises and admissions which we may not wish to make after we have had the opportunity to review both the staff impact statement and any comments thereon which are submitted within the 45 day circulation period. We cannot say, due to the changed circumstances, whether any, all or a part of this testimony will be part of our direct case."

Nonetheless, Intervenors offered to make available "all backup material used by our witnesses in preparing the tes-

[2] Although the Notice states that the Examiner denied Intervenors' request for reconsideration, its context indicates that he reconsidered but declined to change his rulings.

timony which was ready on January 17, 1972, the files of the Greene County Planning Board, and the employees of the Planning Board for consultation".

On February 14, 1972, we petitioned the Court of Appeals for a rehearing of its opinion issued January 17, 1972, and, consequently, we do not consider it appropriate to attempt to interpret it at this time. On the other hand, the public interest requires that this proceeding progress rather than remain dormant pending judicial review; and for this reason the Commission staff offered to prepare a draft environmental impact statement and requested that the environmental information accumulated by all participants be made available for such purpose. Accordingly, any environmental information which is in the form of prepared testimony of Intervenors' direct witnesses should be made available to the Commission staff and other participants together with the other environmental material to be furnished by the participants.

The Commission finds:

In the present posture of this proceeding, the best adopted procedure for assuring compliance with the Federal Power Act and the National Environmental Policy Act of 1969 is set forth in principle below, subject to the continuing authority of the Presiding Examiner to issue further rulings to implement this Order.

The Commission orders:

(A) As soon as practicable, all participants to this proceeding shall make available to the Commission staff and other participants all environmental information requested from them during the course of the conference on January 28, 1972, including any environmental information which is in the form of prepared testimony of Intervenors' direct witnesses which was due for filing on January 18, 1972; but "statements of position, recommended compromises and admissions" may be deleted.

(B) The Commission staff shall prepare a draft environmental impact statement, and shall file it and commence circulation within 45 days after receipt by it of the foregoing environmental information. Participants and agencies shall have 45 days from the date of such filing in which to comment on such statement.

(C) The Examiner shall reopen the record to receive, as soon as practicable after the completion of such circulation period, additional direct testimony from PASNY and the Commission staff, and to allow additional cross-examination promptly thereafter; and he shall open the record to receive, as soon as practicable after the completion of such cross-examination, direct testimony from Intervenors, and to allow cross-examination promptly thereafter.

(D) The Examiner's conference rulings set forth in his Notice dated February 9, 1972, are affirmed to the extent that they are consistent with this Order and reversed to the extent that they are inconsistent herewith.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

FPC Order of June 1, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER PARTIALLY RESCINDING ORDER OF MARCH 7, 1972 AND STAYING FURTHER PROCEEDINGS

(Issued June 1, 1972)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). The principal project works and two of the lines are currently nearing completion. This proceeding involves PASNY's application to construct the third line, which it proposes to route from the Town of Gilboa, in Schoharie County, New York, to the Leeds substation in the Town of Athens, in Greene County, New York.

On January 17, 1972, the United States Court of Appeals for the Second Circuit issued an opinion holding that the Commission staff is required by the National Environmental Policy Act of 1969 (NEPA) to prepare and circulate a draft environmental statement and should have done so prior to hearing.[1] We filed a petition for rehearing which was denied on March 10, 1972.

On March 7, 1972, prior to the Court of Appeals' denial of rehearing, we issued an order setting forth the procedure to be followed in this proceeding pending judicial review

[1] *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412 (CA 2, 1972).

of the *Greene County* decision. Among other things, we concluded that this proceeding should progress rather than remain dormant pending review, and that Commission staff, in compliance with the mandate of the Second Circuit, should proceed with the preparation of a draft environmental statement to be filed within 45 days following the receipt of certain environmental information from the participants.

Since the issuance of our order of March 7, 1972, and the denial of rehearing by the Court of Appeals, the Solicitor General of the United States has agreed to file, on behalf of the Federal Power Commission, a petition with the United States Supreme Court for a writ of certiorari to review the judgment of the Court of Appeals. In view of this fact, and pursuant to our authority under Section 309 of the Federal Power Act, we have decided to rescind our order of March 7, 1972, to the extent that it: (1) requires the Commission staff to prepare and circulate a draft environmental impact statement, (2) directs the Examiner to reopen the record for the receipt and cross-examination of additional evidence, and (3) affirms certain rulings of the Examiner, as set forth in his notice dated February 9, 1972, which are inconsistent with our action today. Such action, we believe, is required in order to preclude the possibility that the issue for which review is sought might become moot. An early resolution of this issue by the Supreme Court will serve to eliminate uncertainty in this proceeding as well as in many other cases before the Commission in which NEPA issues have been raised.

In order to avoid a conflict with the mandate of the Second Circuit, we deem it appropriate to stay these proceedings pending final review by the United States Supreme Court of the validity of the judgment of the Court of Appeals.

The Commission finds:

The proper disposition of the present proceeding will be best served through the partial rescission, as set forth be-

low, of our order of March 7, 1972, and the cessation by Commission staff of any further action toward the preparation of a draft environmental statement pending further order of this Commission. Moreover, these proceedings should be stayed pending final review by the United States Supreme Court of the validity of the judgment of the Court of Appeals in *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 415 (CA2, 1972).

The Commission orders:

(A) Pursuant to our authority under Section 309 of the Federal Power Act, ordering paragraphs (B), (C), and (D), of our order of March 7, 1972, in this proceeding are rescinded and the Commission staff is directed to take no further action toward the preparation of a draft environmental impact statement, pending further order of this Commission.

(B) The proceedings in this matter are stayed pending final review by the United States Supreme Court of the Court of Appeals decision in *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 415 (CA2, 1972).

(C) The Examiner's conference rulings set forth in his Notice dated February 9, 1972, are affirmed to the extent that they are consistent with this order and reversed to the extent they are inconsistent herewith.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

FPC Order of July 5, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER DENYING MOTION FOR RECONSIDERATION

(Issued July 5, 1972)

On June 6, 1969, the Commission granted a license to the Power Authority of the State of New York (PASNY) to construct and operate the Blenheim-Gilboa Pumped Storage Project No. 2685 including, as part of the project works, three 345 Kv transmission lines (41 FPC 712). The principal project works and two of the lines are currently nearing completion. This proceeding involves PASNY's application to construct the third line, which it proposes to route from the project switchyard in the Town of Gilboa, Schoharie County, New York, to the Leeds substation in the Town of Athens, Greene County, New York.

On January 17, 1972, the United States Court of Appeals for the Second Circuit held in *Greene County Planning Board* v. *Federal Power Commission*, 455 F. 2d 412, that the Commission staff is required by the National Environmental Policy Act of 1969 (NEPA) to prepare and circulate a draft environmental impact statement and should have done so prior to the hearing. On February 14, 1972, we petitioned the Court of Appeals for a rehearing.

On March 7, 1972, considering at that time that "the public interest requires that this proceeding progress

rather than remain dormant pending judicial review", we issued an order adopting a procedure for assuring compliance with the Federal Power Act and the National Environmental Policy Act of 1969 pursuant to the Second Circuit's mandate that the "staff should prepare a detailed statement before the Presiding Examiner issues his initial decision." On March 10, 1972, the Second Circuit denied our petition for rehearing, and subsequently the Solicitor General of the United States agreed to file in the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of the Second Circuit. In order to preclude the possibility that the issue for review might become moot, we issued an order on June 1, 1972, partially rescinding our order issued March 7, 1972, and staying further proceedings.

On June 6, 1972, we received from PASNY a telegram, which we are treating as a motion for reconsideration, protesting our Order issued June 1, 1972, and asking that it be rescinded. Asserting that the Gilboa-Leeds line is the most important of the three transmission lines to serve the project and is the key to reliable delivery of power to the New York area, PASNY urged that this proceeding should not be stayed to test a legal issue in the Supreme Court while other licensing proceedings are allowed to continue without the staff having prepared environmental impact statements prior to hearing. PASNY also asserted that the delay is very much against the public interest and that the longer it continues, the greater the transmission line changes, additional costs and environmental problems to be encountered.

Although PASNY also asked that we withdraw our request to the Solicitor General, the petition for a writ of certiorari was filed in the Supreme Court of the United States on June 8, 1972; and, among other matters, it advised the Court of our Orders issued March 7 and June 1,

1972. While we regret the consequences of the delay resulting from our stay, we consider our action to have been necessary and appropriate to carry out the provisions of the Federal Power Act and the policies and goals of the National Environmental Policy Act of 1969.

On June 21, 1972, two days after the last date for filing answers, we received for filing an unsigned original and two copies of the answer and cross-motion of Intervenor Greene County Planning Board, which we are also considering. While the answer generally supports our Order issued June 1, 1972, and questions PASNY's assertions with respect to the importance of the Gilboa-Leeds line, the cross-motion (1) asserts that PASNY's telegram was considered to be a valid filing of a motion although it did not comply with our Rules of Practice and Procedure and (2) requests "that all future filings in this proceeding be deemed proper if an original and two copies are sent to the Commission, and each party of record served with one copy." We believe, however, that in acting upon PASNY's telegram the Secretary of the Commission properly discharged his duties by construing it as a motion for reconsideration, serving it upon the other participants, and thereby affording them an opportunity to respond.

The Commission orders:

PASNY's motion for reconsideration of our Order issued in this proceeding on June 1, 1972, and Greene County's cross-motion for relaxed filing procedures, are denied.

By the Commission.

(SEAL)

KENNETH F. PLUMB,
Secretary.

FPC Order of August 1, 1972

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

POWER AUTHORITY OF THE STATE OF NEW YORK } Project No. 2685

ORDER DENYING APPLICATION

(Issued August 1, 1972)

Power Authority of the State of New York (PASNY) filed a telegram June 6, 1972, which the Commission by letter of June 8, 1972, advised all parties would be treated as a motion for reconsideration of its Order of June 1, 1972, which stayed the proceeding on PASNY's application for authorization to construct a third transmission line for the Blenheim-Gilboa Pumped Storage-Project No. 2685.

In our order of July 5, 1972 we denied the motion for reconsideration after considering PASNY's assertions that staying the proceedings was against the public interest and stated:

> Although PASNY also asked that we withdraw our request to the Solicitor General, the petition for a writ of certiorari was filed in the Supreme Court of the United States on June 8, 1972; and, among other matters, it advised the Court of our Orders issued March 7 and June 1, 1972. While we regret the consequences of the delay resulting from our stay, we consider our action to have been necessary and appropriate to carry out the provisions of the Federal

Power Act and the policies and goals of the National Environmental Policy Act of 1969.

On July 3, 1972, PASNY filed an application pursuant to Section 313 of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure for rehearing of the Commission's order of June 1, 1972, by which the proceedings were stayed.

In addition elaborating on its reasons why it believed the stay of proceedings to be against public interest, PASNY also asserted without elaboration that ". . . The June 1 Order, having been issued without notice in violation of relevant statutes and the Commission's own regulations, was void." PASNY does not refer to any particular statutory or regulatory provisions, and we are not aware of any requiring Notice before the Commission could temporarily stay its own proceedings. On the contrary, in view of the breadth of our discretion under Section 309 of the Federal Power Act (16 U.S.C. Section 825(h)), established in *Niagara Mohawk Power Corporation* v. *Federal Power Commission*, 379 F.2d 153 (1967), we are confident as to the validity of our Order issued June 1, 1972.

Inasmuch as the June 1 Order complained of is procedural in nature, the Commission may modify it at any time and continue the proceedings, when to do so will not conflict with the mandate of the Second Circuit in *Green County Planning Board* v. *Federal Power Commission*, 455 F.2d 415 CA2, (1972), and will not render moot a serious legal question now pending for review by the Supreme Court of the United States in this same case.

Since PASNY's application of July 3, 1972, reiterates with elaboration contentions similar to those set forth in the telegram of June 6, 1972, and which were considered in our denial of July 5, 1972, the application should likewise be denied.

The Commission orders:

The Application of the Power Authority of the State of New York filed July 3, 1972 asking for further reconsideration of our order of June 1, 1972 is denied.

By the Commission.

(SEAL)

MARY B. KIDD,
Acting Secretary.

Presiding Examiner's Notice of Certification

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

POWER AUTHORITY OF THE STATE OF NEW YORK (PASNY) } Project No. 2685

PRESIDING EXAMINER'S DENIAL OF REQUEST TO RECONSIDER RULING MADE AT CONFERENCE ON JANUARY 28, 1972 AND NOTICE OF CERTIFICATION

TO THE COMMISSION:

Cross-examination of applicants and staff's direct case was concluded on January 7, 1972, and the hearing was recessed to resume February 15, 1972, for the cross-examination of Intervenors prepared testimony due on or before January 18, 1972. On January 17, 1972, the Court of Appeals issued an opinion in *Greene County Planning Board* v. *Federal Power Commission et al.* Docket Nos. 71-1991, 1996 holding *inter alia* that the Commission failed to comply with the National Environment Policy Act and remanding for further proceedings in accordance with its opinion. Accordingly, a conference was called for Friday, January 28, 1972 at 10 A.M., at the Office of the Commission for the purpose of considering the impact of the Court of Appeal's opinion on the future course of the proceeding and adopting such procedures and schedules as may be required by the courts opinion and remand.

By letter dated January 18, 1972, the Presiding Examiner was advised that Intervenors, in view of "yesterdays opinion of the United States Court of Appeals . . . are not submitting any direct testimony at this time." . . . and "await guidance from the Commission concerning *the* most efficient procedure for meeting the mandate of the Court."

On January 25, 1972, Intervenors wrote advising that they would not be at the conference, that the conference was not properly called, and requesting that the letter be copied into the transcript of the conference as a statement of their position (See TR. 1864-1867).

The conference was held on Friday, January 28, 1972 (See attached transcript Vol. No. 12) at which time the Presiding Examiner considered the position and requests of all the parties, including Intervenors, and made the following rulings:

1. The Presiding Examiner's continuing jurisdiction to proceed with the hearing, and to determine the most efficient procedure for meeting the court's opinion, has not been terminated or revoked by the Commission or by the Courts.

2. The Staff was directed to file a detailed environmental statement within 45 days from the receipt of certain requested data from Applicants, and to serve copies of such statement on all the parties and Agencies to whom the Applicants Environmental Statement was distributed.

3. All parties and agencies will have 45 days thereafter to file their comments along with any answering testimony or requests for a further opportunity to examine PASNY and Staff witnesses in the light of Staff environmental statement.

4. Intervenors were directed to file forthwith their direct testimony, due January 18, 1972, and to make any motions they deemed necessary concerning a convenient time and place for cross-examination of their witnesses.

5. The February 15th hearing date was recessed pending the filing of Intervenors direct testimony. A new hearing date will be fixed when such testimony is filed.

On February 4, 1972, Intervenors wrote requesting, *inter alia*, that I reconsider the above rulings, correct the record, and in any event, refer them to the Commission. (A copy of their letter is attached.)

The Presiding Examiner has carefully reconsidered his rulings in the light of Intervenors letter of February 4, 1972, and sees no good reason for Intervenors continuing default in the filing and cross-examination of its prepared direct testimony concedely available for filing when due on January 18, 1972. The cross-examination of PASNY and Staff's direct case was concluded on January 7, 1972. Progress in completing the direct phase of this proceeding is the most efficient procedure for meeting the Court's mandate pending the filing of the Staff's detailed environmental statement now in preparation. Intervenors will, of course, have full opportunity to respond to such statement, to file answering testimony, and to cross-examine PASNY and Staff witnesses in the light of the statement. Not to proceed with Intervenors prepared direct testimony is conducive to the very delay which Intervenors take such pains to discuss in the Appendix to their letter of February 4, 1972.

Accordingly, their request for reconsideration is denied and the conference rulings reaffirmed. However, in view of the status of this proceeding in the Court of Appeals, the Presiding Examiner's Rulings are certified to the Commission for its consideration, as requested, under § 1.28 of the Commissions Rules of Practice and Procedure.

Respectfully submitted this 9th day of February, 1972.

/s/ William C. Levy
William C. Levy
Presiding Examiner

Attachments

Copy to all Parties

Court of Appeals Order Modifying Opinion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of February, one thousand nine hundred and seventy-two.

GREENE COUNTY PLANNING BOARD,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY, POWER AUTHORITY OF THE STATE OF NEW YORK, THE SIERRA CLUB,

Intervenors.

Upon the motion made herein by intervenor, Power Authority of the State of New York, by notice dated February 14, 1972, to modify and clarify portions of this Court's opinion dated January 17, 1972, it is hereby ordered that the sentence "PASNY has admitted that the Gilboa-Leeds line is part of a plan which may include three massive pumped storage hydroelectric projects, six 345 kilovolt transmission lines and three 765 kilovolt transmission lines", beginning on page 13, line 18 of the opinion, be deleted and the following sentence substituted: "PASNY has indicated that this line is part of a plan which may include an additional massive pumped storage hydroelectric project with attendant transmission lines."

It is further ordered that the date March 21, 1971, on page 5, line 15, of the opinion be deleted and the following date substituted: "March 26, 1971".

It is further ordered that the appearances for the Power Authority of the State of New York be changed to read:

> "Scott B. Lilly, New York, N. Y. (Thomas F. Moore, Jr., New York, N. Y., John R. Davison, New York, N. Y., John C. Mason, Washington, D. C., of counsel), *for Intervenor Power Authority of the State of New York.*"

J. Joseph Smith
Irving R. Kaufman
William H. Mulligan
Circuit Judges

Dated: February 28, 1972